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IN THE SUPERIOR COURT OF ARIZONA
COUNTY OF YAVAPAI

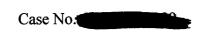
JOHN B. CUNDIFF and BARBARA C. ) CUNDIFF, husband and wife; BECKY NASH, ) a married woman dealing with her separate ) property; KENNETH PAGE and KATHRYN ) PAGE, as Trustee of the Kenneth Page and ) Kathryn Page Trust,

Plaintiffs,

VS.

**DONALD COX** and **CATHERINE COX**, husband and wife,

Defendants.



PLAINTIFFS' MOTION FOR RECONSIDERATION RE DENIAL OF SUMMARY JUDGMENT ON AFFIRMATIVE

DEFENSE OF WAIVER

Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Katheryn Page, by and through undersigned counsel, pursuant to Rule 7.1(e) hereby request that this Court reconsider its ruling of April 4, 2005, denying Plaintiffs' motion for summary judgment on the affirmative defense of waiver.

This motion for reconsideration is supported by the following memorandum of points and authorities.

RESPECTFULLY SUBMITTED this  $22^{nd}$  day of April, 2005.

FAVOUR MOORE & WILHELMSEN, P.A.

By

David K. Wilhelmsen Marguerite Kirk

DIV. 1

APR 26 2005

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## MEMORANDUM OF POINTS AND AUTHORITIES

On April 4, 2005, this Court entered its ruling granting Plaintiffs' motion for summary judgment precluding Defendants' from raising the affirmative defenses of laches, estoppel and unclean hands. However, the Court denied Plaintiffs' motion for summary judgment on the affirmative defense of waiver of the recorded restrictive covenants at issue in the case. This motion for reconsideration requests the Court review its decision with respect solely to the denial of summary judgment on the affirmative defense of waiver.

In this case, the recorded restrictive covenants at issue expressly provides a non-waiver provision. Under the Arizona Court of Appeals holding in *Burke v. Voicestream Wireless Corp.*, 207 *Ariz.* 393, 87 *P.2d* 81 (*App. Div.1* 2004), where the recorded covenants contain a non-waiver clause, as a matter of law, a defendant may not raise the defense of waiver in an action to enforce the covenants.

This is not to say that the defendant cannot raise the affirmative defense of abandonment of the recorded restrictions. Where a defendant contends that the restrictions have been so thoroughly disregarded as to render them abandoned and of no force or effect, the defendant is asserting that all the restrictive covenants are thereby legally inoperative. The confusion arises when, as in this case, the covenants defendant argues are abandoned contain a non-waiver provision. Under *Voicestream*, the only way a defendant can assert waiver in the face of a non-waiver clause in the recorded restrictions is to raise the affirmative defense of abandonment. In other words, when the recorded covenants contain a non-waiver provision, the *Voicestream* decision precludes a defendant as a matter of law from raising the affirmative defense of waiver, and limits the defendant to raising the affirmative defense of abandonment.

In this case, permitting Defendants to assert waiver leads to a dubious legal result. The Arizona appellate court has expressly stated that the non-waiver provision forecloses any defendant from claiming waiver as a defense to enforcement of the covenants. Defendants may still assert abandonment of the restrictive covenants, which requires a showing that the covenants have been so

thoroughly disregarded that the purpose for the restrictions is defeated. In so arguing, Defendants are necessarily contending that all covenants contained in the recorded restrictions are a legal nullity, including the non-waiver provision. Unless Defendants by clear and convincing evidence establish abandonment of the covenants, they cannot separately assert a defense of waiver, as this argument is legally foreclosed by the non-waiver provision.

To allow Defendants to assert both affirmative defenses of waiver and abandonment, when the former is precluded under Voicestream, and the latter necessarily includes the non-waiver clause, leads to the incongruous result that the jury will be instructed on a defense - waiver - which it cannot consider.

Therefore, as Defendants are only legally entitled to assert the defense of abandonment, which is the only way the non-waiver provision would be rendered inoperative, Plaintiffs request that this Court reconsider its ruling allowing Defendants to raise a defense of waiver notwithstanding the Arizona appellate court's ruling in Burke v. Voicestream Wireless Corp., supra.

DATED this 22<sup>nd</sup> day of April, 2005.

FAVOUR MOORE & WILHELMSEN, P.A.

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25 26 Original of the foregoing filed this 22<sup>nd</sup> day of April, 2005 with:

Clerk, Superior Court of Arizona Yavapai County Prescott, Arizona

A copy hand-delivered this 22<sup>nd</sup> day of April, 2005 to:

By:

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1	Honorable David L. Mackey
2	Division One Superior Court of Arizona
3	Yavapai County Prescott, Arizona
4	and, a copy hand-delivered this 22 <sup>nd</sup> day of April, 2005 to:
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